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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 717

RICHARD A. INMAN,

Petitioner,

v.

CITY OF MIAMI, a Municipal Corporation, and RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit In and For Dade County, Florida,

Respondents.

PETITIONER'S REPLY BRIEF

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RESPONSE TO RESPONDENT'S PREFACE

The Petitioner provided a certified transcript of the entire record in the trial court, to which court the record had been returned by the District Court of Appeal, Third District, the Court whose judgment or decree is sought to be reviewed. The same was done inasmuch as a certified copy of the record in the Supreme Court of Florida had been provided, and the record in the District Court of Appeal, Third District, was not available because that Court had returned it to the lower court. Rule 21, Supreme Court of the United States Revised Rules, Adopted June

12, 1967, Effective October 2, 1967, does not require that a copy of the transcript be served upon the Respondent and in accordance with the said Rule no copy was furnished to the Respondents. The entire record of the cause is before the Supreme Court of the United States via the certified transcript of record, certified by the Clerk of the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida.

RESPONSE TO RESPONDENT'S QUESTION PRESENTED

Respondent's handling of the omission of the word "knowingly" where the same is grammatically incorporated in Petitioner's Question by the use of the word in the immediately preceding clause of the Question indicates the weakness of its argument. The entire thrust of Petitioner's Argument is made in terms of the ordinance providing for knowledge on the part of the liquor licensee, and there was no attempt on the part of Petitioner to argue otherwise.

The Petitioner stated in the Question Presented that he is an admitted homosexual, this being in the Record as reflected in the Complaint. The respondent raises the proposition that the Petitioner had denied in a voluntary television appearance that he is a homosexual. The respondent had cross-assigned as error the denial by the trial court of its Motion to Strike the Complaint under Rule 1.14, Florida Rules of Civil Procedure, 1965 Revision, because there was, it alleged, unrefuted evidence showing that Petitioner was not a homosexual, by virtue of the television appearance. The District Court of Appeal, Third District, refused to consider the exercise of the trial

court's discretion in this particular, and the pertinent paragraph of the decision is hereafter quoted:

> "The City by cross-assignment contends that the court should have granted its motion to strike the complaint under Rule 1.14 Florida Rules of Civil Procedure, 1965 Revision, because there was evidence showing that appellant was not a homosexual at the time the proceeding was instituted. In view of our conclusion upon the appeal, it is unnecessary to consider the exercise of the trial court's discretion in this particular."

It would appear inappropriate for the United States Supreme Court to determine a question of the abuse of discretion of the trial court in connection with a Florida procedural rule when the Florida Appellate Court refused to go into the merits of this position. The Complaint (which was never stricken) admitted the homosexuality of the Petitioner and Respondent's attempt to alter Petitioner's Question Presented in this regard is improper.

As to the Respondent's proposition that no stay order was obtained from the Florida Supreme Court, the Petitioner asserts that this is an absurd argument. There was nothing to be stayed. Consequently, the failure to file Petition for Writ of Certiorari in the Florida Supreme Court within fifteen days from the District Court of Appeal's decision is of no effect. The said fifteen day provision which the Respondent quotes on P. 7 of its brief is merely to indicate that if it is required that something be stayed, that certiorari should be sought within fifteen days rather than within sixty days which is allowed by the Florida Appellate Rules. The fifteen day provision,

however, does not cut down the jurisdictional time of sixty days within which to seek certiorari. The Petitioner timely sought certiorari in the Florida Supreme Court and the same was denied on the ground that the Supreme Court had no jurisdiction since there was no conflict between the **Inman** decision and any other decision of the Florida Supreme Court or another District Court of Appeal. The Petitioner then timely sought certiorari to the District Court of Appeal, Third District, in the United States Supreme Court within ninety days from the Florida Supreme Court's denial of certiorari. This procedure has been recognized as proper in **American Railway Express Company v. Levee** (1923) 263 U.S. 19, 68 L.Ed. 140, 44 S.Ct. 11, wherein the Court discussed the fact that in Louisiana the Constitution of that State provides that the jurisdiction of its Supreme Court is discretionary, but that the Petitioner had to invoke that jurisdiction in order to make certain that the case could go no further in that State. When the Louisiana Supreme Court declined jurisdiction, the Court of Appeal was shown to be the highest court in the state in which a decision could be had. There it was pointed out that the limit of time within which to seek certiorari in the United States Supreme Court was from the date when the Writ of Certiorari was refused in the State Supreme Court. Likewise, in the instant case the time limit is to be computed from the date when the Florida Supreme Court refused certiorari. The automatic stay provision that Respondent refers to is completely irrelevant to the proposition that Florida allows sixty days from the date of the intermediate appellate court order within which to seek certiorari in the Florida Supreme Court, with which provision Petitioner complied.

RESPONSE TO RESPONDENT'S ARGUMENT

The entire thrust of the Argument of Petitioner's brief is from the point of view of the knowing allowance of the gathering of two or more homosexuals in the liquor licensee's establishment and the knowing sale or knowing service to homosexuals. Petitioner's argument is that the ordinance, instead of denouncing conduct, denounces a condition which may be unaccompanied by objectionable conduct. The Petitioner would not quarrel with an ordinance which prohibits the liquor licensee from knowingly serving or knowingly permitting two or more people to gather in his establishment if those people commit the acts which Respondent describes in its question on Page 11 of its brief.

Respondent's argument assumes that the condition of homosexuality necessarily implies the commission in public of objectionable conduct such as one male's fondling of another's private parts. That Respondent makes this assumption is made clear by its reliance on **Nickola v. Munro**, Cal. App. 1958, 328 P.2d 271, wherein there was evidence of objectionable activity on the part of the patrons. On the basis of the evidence of the commission of immoral acts, readily observable by the licensee, the court there found against the licensee. The Miami ordinance here under attack, however, makes the status, without more, without overt conduct, the criteria for serving liquor to or permitting homosexuals to gather on the licensee's premises.

The Respondent argues its brief in terms of conduct as illustrated in the first paragraph of the brief on Page

15, but it is not conduct which the ordinance prohibits; rather it is a status or condition, irrespective of conduct.

The distinction between the status of homosexuality and objectionable conduct committed in public by persons who may be homosexuals was clearly enunciated in the November 6, 1967, decision of the New Jersey Supreme Court, rendered in **One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control,** and the companion cases of **Val's Bar, Inc. v. Division of Alcoholic Beverage Control,** and **Murphy's Tavern, Inc. v. Division of Alcoholic Beverage Control,** A.2d , which decision is not yet available in the advance sheet of the Atlantic 2d Reporter, and is therefore reproduced in the Appendix hereto. In that case, the Division of Alcoholic Beverage Control had disciplined the liquor licensee for permitting apparent homosexuals to congregate at the licensed premises. The Alcoholic Beverage Control suspended the license of two licensees and revoked the license of another. The New Jersey Supreme Court reversed, and after tracing the history of regulations in reference to liquor, said the following:

> "In the very cases before us the Division of Alcoholic Beverage Control made it clear that it has not in anywise moderated its long standing position that permitting the congregation of apparent homosexuals, without more, is violative of Rule 5. The evidence against Murphy's Tavern disclosed many individual acts which could have been the basis of specified and individualized charges of lewd or immoral conduct at the licensed premises. But no such charges were preferred and when, during the course of cross-

examination, one of the division's investigators was asked whether he had observed any lewdness at Murphy's Tavern, the prosecuting attorney pointed out that the division had not alleged 'any immoral activity or lewdness itself' but had simply alleged that the licensee had 'permitted the licensed place of business to become a nuisance' in that it had allowed 'these persons to come in and congregate upon the premises.'

"In the **One Eleven** proceeding there was no charge and no substantial evidence that lewd or immoral conduct was permitted at the licensed premises. There was a charge and sufficient evidence that the licensee had permitted apparent homosexuals to congregate there. Investigators had visited the premises on several occasions and had observed the patrons; the testimony included the following partial account of their behavior:

> They were conversing and some of them in a lisping tone of voice, and during certain parts of their conversations they used limp-wrist movements to each other. One man would stick his tongue out at another and they would laugh and they would giggle. They were very, very chummy and close. When they drank their drinks, they extended their pinkies in a very dainty manner. They took short sips from their straws; took them quite a long time to finish their drink.

* * *

They were very, very endearing to one another, very very delicate to each other.

* * *

They looked in each other's eyes when they conversed. They spoke in low tones like an effeminate male. When walking, getting up from the stools, they very politely excused each other, hold on to the arm and swish and sway down to the other end of the bar and come back. * * *

Their actions and mannerisms and demeanor appeared to me to be males impersonating females, they appeared to be homosexuals commonly known as queers, fags, fruits and other names.

"Similarly in the proceeding against Val's Bar there was no charge nor any substantial evidence at the hearing before the director that lewd or immoral conduct was permitted at the licensed premises. Investigators had visited the premises on several occasions and testified in detail as to the behavioral characteristics which led them to the permissible conclusion that the patrons were apparent homosexuals."

The crucial holding of the New Jersey Supreme Court is:

"Though in our culture homosexuals are indeed unfortunates, their status does not make

them criminals or outlaws. **Cf. Robinson v. California**, 370 U.S. 660, 8 L.Ed.2d 758 (1962). So long as their public behavior violates no legal proscriptions they have the undoubted right to congregate in public. And so long as their public behavior conforms with currently acceptable standards of decency and morality, they may, at least in the present context, be viewed as having the equal right to congregate within licensed establishments such as taverns, restaurants and the like.

* * *

"... Now, in the 1960's, the transitional need as such is long past and it is entirely appropriate that full sweep be given to current understandings and concepts. Under them it seems clear that, so long as the division can deal effectively with the matter through lesser regulations which do not impair the rights of well behaved apparent homosexuals to patronize and meet in licensed premises, it should do so. Such narrower course would be consonant with the settled and just principle that restrictions adopted in the exercise of police powers must be reasonable and not go beyond the public need. **See N. J. Good Humor, Inc. v. Bradley Beach**, 124 N.J.L. 162, 168 (E. & A. 1940); **Reingold v. Harper**, 6 N.J. 182, 192 (1951); **cf. Griswold v. Connecticut, supra**, 381 U.S. at 485-86, 14 L.Ed.2d at 515-16; **NAACP v. Alabama**, 377 U.S. 288, 307, 12 L.Ed.2d 325, 338 (1964).

"It must be borne in mind that the division has produced nothing to support any need for continuance of its flat prohibition. Nor has it produced anything to indicate that it could not readily prepare and enforce a fair and sensible regulation which, while permitting apparent homosexuals to assemble in and patronize licensed establishments, prohibits overtly indecent conduct and public displays of sexual desires manifestly offensive to currently acceptable standards of propriety. Such a regulation might well be adopted forthwith to the end that future proceedings would rightly be based on specific charges of improper conduct at the licensed premises rather than, as here, upon general charges of mere congregation which we deem to be unreasonable and legally unsupportable. In the meantime, the discipline imposed in the three cases before us must be set aside, without prejudice, however, to any new charges which the division may prefer against the licensees, or any of them, clearly describing the individual acts alleged to be violative of the provisions in Rule 5 aimed at lewd and immoral conduct within the licensed premises. See Vallerga v. Dept. of Alcoholic Beverage Con., supra, 347 P.2d at 913-14."

The New Jersey Supreme Court clearly differentiates between the status of homosexuality and homosexual conduct which conduct could be prohibited by ordinance. It is this very differentiation which Petitioner is arguing.

CONCLUSION

For the reasons asserted in Petitioner's main brief and asserted herein, it is submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALFRED I. HOPKINS

JUDITH A. BRECHNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed this _____ day of January, 1968, by depositing a copy of the same in the United States mail with sufficient postage pre-paid to RICHARD E. GERSTEIN, State Attorney, Metropolitan Justice Building, Miami, Florida, and to ALAN R. ROTHSTEIN, City Attorney, S. R. STERBENZ, Asst. City Attorney, 65 S.W. 1st Street, Miami, Florida, Attorneys for Respondent CITY OF MIAMI.

ALFRED I. HOPKINS